In The Matter of:

OWEN MCCAFFERTY, DENNIS MALONEY,
SEAN KILBANE, TERRY McLAUGHLIN,
SEAN McCAFFERTY, and ROBERT PROHASKA,

COMPLAINANTS,

v.

CENTERIOR ENERGY,

RESPONDENT.

CASE NO. 96-ERA-6

DATE: OCT 16 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

ORDER DENYING STAY

On June 11, 1996, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. and O.) in this case arising under Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1994).[2] The ALJ found in favor of all Complainants, and recommended relief, including reinstatement in accord with his instructions, back pay, removal of the denial of access flag from Complainants' personnel records, and interest on the back pay awards. R. D. and O. at 21. The ALJ also ordered Respondent Centerior Energy (Centerior) to pay Complainants' costs and expenses, including attorney's fees reasonably incurred.[3] *Id*. On July 15, 1996, pursuant to the 1992 amendment to the ERA's employee

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[1]On April, 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing this reorganization were also promulgated on this date.

[2] Section 211 of the ERA was formerly designated Section 210, but was redesignated pursuant to Section 2902(b) of the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776, which amended the ERA effective October 24, 1992.

[3] The ALJ allowed Complainants thirty days within which to submit their application for fees and costs and Centerior ten days in which to respond. *Id.* The specific amount of attorneys

(continued...)

whistleblower provision, the Administrative Review Board (Board) issued a Preliminary Order that Centerior comply with the relief ordered by the R. D. and O. Preliminary Order (P. O.) at 2-3.[4]

On July 25, 1996, Complainants filed an action in the United States District Court for the Northern District of Ohio Eastern Division, seeking enforcement of the Board's Preliminary Order pursuant to Section 211(e) of the ERA, 42 U.S.C. § 5851(e) (1994).[5] The following day, July 26, 1996, Centerior filed with the Board a Motion to Stay Preliminary Order (Motion). On August 15 Complainants filed a response to that motion (Response). For the reasons discussed below we deny Centerior's motion.

DISCUSSION

Centerior's stay motion arises in an unusual context. Typically stay motions are filed following final agency action in order to maintain the *status quo* pending judicial review. Thus, the principal statutory authority for administrative stays, Section 10(d) of the Administrative Procedure Act, 5 U.S.C. § 705(d) (1988), provides in part that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.' Here, we do not have final agency action which is being judicially challenged. Rather we have a "preliminary order" of the Board, which will remain in effect only until the Board issues its final decision on the merits of this case. When we render the final agency decision, the preliminary order will be superseded either by a final award of relief (which may be different from that preliminarily ordered) or by a decision finding no liability and denying relief. *See, e.g., Varnadore v. Oak Ridge National Laboratory and Lockheed Martin Energy Systems,* 94-CAA-2, 94-CAA-3, ARB Ord., Sept. 6, 1996.[6]

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[3](...continued)
fees and costs owed has not yet been ordered by the ALJ.

[4] A final decision on the merits of the R. D. and O. must await a decision by the Board on the substance of this case, which will be issued in due course.

[5] Section 211(e) provides:

> (1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

[6]Complainants argue that the Board does not have statutory authority to grant a stay of a preliminary order issued pursuant to Section 211 because that authority is expressed in mandatory terms. Response at 5-6. Complainants also argue that the Board does not have jurisdiction to decide the stay issue because jurisdiction is now vested in the federal district court in which their petition for enforcement of the P. O. is pending. *Id.* at 6-7. Because we conclude that a stay is not warranted in this case, we need not, and do not, decide these two issues.

The courts have developed a four part test to determine when agency action should be stayed, and some agencies, including the Department of Labor, have applied those standards in deciding whether to stay their own actions. *See Virginia Petroleum Jobbers Association v. Federal Power Commission,* 25 9 F. 2d 921 (D.C. Cir. 195 8); *State of Ohio ex rel. Celebrezze v. N.R.C.,* 812 F.2d 288 (6th Cir. 1987); *OFCCP v. University of North Carolina,* Case No. 84-OFC-20, Sec. Order Denying Stay, Apr. 25, 1989, slip op. at 7; *Goldstein v. Ebasco, Case* No. 86-ERA-36, Sec. Order Denying Stay, Aug. 31, 1992, reversed on other grounds *sub num Ebasco Constructors, Inc. v. Martin,* No. 92-4576 (5th Cir. Feb. 19, 1993)(unpublished); *Rexroat v. City of New Albany, Indiana,* Case No. 85-WPC-3, Sec. Order Denying Stay Oct 8, 1986, slip op at 2-3. The factors set forth in *Celebrezze* are:

> . . . (1) the likelihood that the party seeking a stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

State of Ohio ex rel. Celebrezze v. N.R.C., 812 F. 2d at 290. Evaluation of Centerior's motion based on these factors leads to the conclusion that a stay should be denied.

First, Centerior has not demonstrated that it is likely to prevail on the merits. Centerior argues that Complainants' "personal injury lawsuit" seeking compensatory damages cannot be considered to be protected activity under the ERA whistleblower provision. Motion at 4. Section 211 prohibits an employer from retaliating against an employee who has among other things:

> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
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> (E) testified or is about to testify in any such proceeding or;
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> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851 (1994). Complainants asserted jurisdiction for their federal lawsuit against Centerior under the Price-Anderson Act, 42 U.S.C. § 2210 (1988). R. D. and O. at 4. As the Price-Anderson Act, enacted in 1957, amended the Atomic Energy Act, Complainants' federal lawsuit appears on its face to be a "proceeding... under the Atomic Energy Act" or an 'action to carry out the purposes of... the Atomic Energy Act of 1954, as amended." *See* R. D. and O at 7-9. Centerior has failed to address the Price-Anderson Act issue. Indeed Centerior refers to Complainants' federal action as a "state law tort claim[]." Motion at 7.

Centerior also argues that the purpose of the ERA whistleblower provision is to encourage reporting to the Nuclear Regulatory Commisson (NRC). Because Complainants filed their Price-Anderson law suit after Centerior had reported to the NRC the unplanned exposure of Complainants to radiation, and after the NRC had issued a notice of violation to Centerior, Complainants' law suit "played no role whatsoever in" encouraging the "reporting of safety

information to the Nuclear Regulatory Commission." Motion at 7. Therefore, according to Centerior, Complainants' Price-Anderson suit cannot be considered protected activity. *Id*. Centerior too narrowly limits the scope of protected activity under the ERA.

It is not necessary, in order for an employee's action to be considered protected under the ERA whistleblower provision, for that action to have a direct effect upon nuclear safety. Thus, for example, it matters not that an employee complains about a hazard that has already been corrected, or complains to the NRC about a condition that the employer is already aware of. The complaint may still be considered protected activity. If, in order to come within the protection of the ERA's whistleblower provision, an employee had to determine whether the condition he or she wanted to report had already been discovered by the employer, or was already being addressed by the NRC, employees would be discouraged from bringing potentially significant complaints to the attention of the authorities. If Centerior's theory were correct, an employer who had created a nuclear hazard and had been cited for it by the NRC, could retaliate with impunity against an employee who belatedly reported that violation to the NRC. The language of Section 211 does not require such a far-fetched result. Thus, the fact that Centerior and the NRC had already addressed the condition which was the subject of Complainants' Price Anderson law suit does not render that suit beyond the protective ambit of the ERA whistleblower provision.[7]

Centerior also argues that it will prevail on the merits of its challenge to the ALJ's recommended back pay awards. Motion at 9-11. The gist of Centerior's challenge is that significant uncertainties exist as to whether and when various Complainants would have been hired for the most recent outage. However, as the Board recently reaffirmed in *Doyle v. Hydro Nuclear Services,* ARB Final Dec. and Ord., Sept. 6, 1996, slip op. at 5, uncertainties in calculating back pay are to be resolved against the discriminating party. Although the ALJ made several assumptions regarding the employment of Complainants, Centerior has not demonstrated that those assumptions were not warranted by the evidence. Centerior has not demonstrated that it is likely to prevail on this issue.

Second, Centerior has not demonstrated that it will suffer irreparable harm if the preliminary order stays in effect while the case is pending before the Board. Centerior hypothesizes that it will suffer irreparable harm because the preliminarily awarded back pay will be unrecoverable once in the hands of Complainants. Motion at 12. However, as Centerior notes elsewhere (Motion at I 1), all six Complainants were regularly employed at the time of the hearing, and there was no evidence presented that they were judgment proof. More importantly, "mere" financial loss cannot support a finding of irreparable harm. *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d at 925.

Centerior also argues that reinstatement of the Complainants will cause irreparable harm because it will be "compelled to hire six employees whom it does not consider suitable for the work involved and who may be emotionally unfit for service." Motion at 12. However, Centerior

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[7] That is not to say that an employer's actions to correct a hazard are not relevant in a retaliation case. The fact that a hazard has already been addressed by an employer before an employee complains about it might be highly relevant to the issue of the employer's motive to retaliate.

fails to square this assertion with the one made on the same page of its motion that Complainants will not be harmed by a stay because there "is no ongoing or scheduled outage at either of Centerior's nuclear power plants," and thus, there are no positions into which the Complainants could be reinstated at this time.[8] We conclude that Centerior has not made a significant argument that it will suffer irreparable harm if the stay is not granted.

For the same reasons, we do not believe that Complainants would suffer irreparable harm if the stay were granted. None of them would be working for Centerior at this time in any event, because there are no outages in effect, and further delay in the award of back pay has not been shown to cause irreparable harm in the circumstances of this case.

Finally, the public interest clearly favors the denial of a stay. The public interest here is most clearly expressed in the 1992 amendment to the ERA which provided for the issuance of a preliminary order. Congress must certainly have been aware that an ALJ's recommended decision might be rejected at the departmental level. However, Congress was concerned that delays between the issuance of the ALJ's recommended decision and the final decision of the Department of Labor would effectively deprive complainants of the relief to which they might be entitled. Here, the public interest in securing an early award of relief to whistleblower complainants weighs in favor of denial of a stay.

In the absence of a strong showing either way with regard to irreparable harm, Centerior's failure to demonstrate that there is a "strong or substantial likelihood of success" on the merits, together with the clearly expressed public interest in favor of preliminary orders in ERA whistleblower cases, leads us to the conclusion that Centerior's motion for a stay should be denied.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member

[8] Complainants are insulators who have only worked for Centerior during outages.